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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL,

Appellants,

v.

ELLIOTT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JAMES E. ALLEN, JR., Commissioner of Education of the United States; MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut; SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE
MARVIN K. PETERSON,
Chairman of the Commission on Aid to Higher Education of the State of Connecticut

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OPINION BELOW

The opinion of the United States District Court for Connecticut is reported in 312 F. Supp. 1191 (1970) (Record Appendix, pp. 37-67).

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JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

QUESTIONS PRESENTED

1. Whether Title I of the Higher Education Facilities Act of 1963 authorizes grants to defendant church related colleges and universities for construction of academic facilities?

2. If so, whether the Act and grants thereunder impair the plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides inter alia:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ."

The sections of the Higher Education Facilities Act of 1963, 20 U.S.C. § 701-758 (1964), set forth below are considered to be material to this Court's consideration of the constitutional issue:

Sec. 701. Congressional findings and declaration of policy.

The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that

this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities. (20 U.S.C. § 701).

Sec. 716. Eligibility of institutions for grants.

An institution of higher education shall be eligible for a grant for construction of an academic facility under this subchapter only if such construction will, either alone or together with other construction to be undertaken within a reasonable time, (1) result in an urgently needed substantial expansion of the institution's student enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution, or (2) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution. (20 U.S.C. § 716).

Sec. 717. Basic criteria for determining priorities and Federal share.

(a) As soon as practicable after December 16, 1963 the Commissioner shall by regulation prescribe basic criteria to which the provisions of State plans setting forth standards and methods for determining relative priorities of eligible construction project, and the application of such standards and methods to such projects under such plans, shall be

subject. Such basic criteria (1) shall be such as will best tend to achieve the objectives of this subchapter while leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions in the several States, and (2) shall give special consideration to expansion of undergraduate enrollment capacity. Subject to the foregoing requirements, such regulations may establish additional and appropriate basic criteria, including provision for considering the degree to which applicant institutions are effectively utilizing existing facilities, provision for allowing State plans to group or provide for grouping, in a reasonable manner, facilities or institutions according to functioning or educational type for priority purposes, and, in view of the national objectives of this chapter, provision for considering the degree to which the institution serves students from two or more States or from outside the United States; and in no event shall an institution's readiness to admit such out-of-State students be considered as a priority factor adverse to such institution. [20 U.S.C. 717(a)].

Sec. 718. Applications for grants — Submission of applications by institutions.

(a) Institutions of higher education which desire to obtain grants under this subchapter shall submit applications therefor at such time or times and in such manner as may be prescribed by the Commissioner, and such applications shall contain such information as may be required by or pursuant to regulations for the purpose of enabling the Commissioner to make the determinations required to be made by him under this subchapter.

Conditions for approval.

(b) The Commissioner shall approve an application covering a project for construction of an academic facility and

meeting the requirements prescribed pursuant to subsection (a) of this section if—

(1) the project is an eligible project as determined under section 716 of this title;

(2) the project has been approved and recommended by the appropriate State commission;

(3) the State commission has certified to the Commissioner, in accordance with the State plan, the Federal share of the development cost of the project, and sufficient funds to pay such Federal share are available from the applicable allotment of the State (including any applicable reallotment to the State);

(4) the project has, pursuant to the State plan, been assigned priority that is higher than that of all other projects within such State (chargeable to the same allotment) which meet all the requirements of this section (other than this clause) and for which Federal funds have not yet been reserved;

(5) the Commissioner determines that the construction will be undertaken in an economical manner and will not be of elaborate or extravagant design or materials; and

(6) the Commissioner determines that (in addition to the assurance required by section 753 of this title and such assurance as to title to the site as he may deem necessary) the application contains or is supported by satisfactory assurances—

(A) that Federal funds received by the applicant will be used solely for defraying the development cost of the project covered by such application,

(B) that sufficient funds will be available to meet the non-Federal portion of such cost and to provide for the effective use of the academic facility upon completion, and

(C) that the facility will be used as an academic facility during at least the period of the Federal interest therein (as defined in section 754 of this title).

Amendments of applications.

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications. [20 U.S.C. Sec. 718].

Sec. 751. Definitions.

As used in this chapter—

(a) (1) Except as provided in subparagraph (2) of this paragraph, the term "academic facilities" means structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research, or for administration of the educational or research programs, of an institution of higher education, and maintenance, storage, or utility facilities essential to operation of the foregoing facilities. Plans for such facilities shall be in compliance with such standards as the Secretary of Health, Education and Welfare may prescribe or approve in order to insure that facilities constructed with the use of Federal funds under this chapter shall be, to the extent appropriate in view of the uses to be made of the facilities, accessible to and usable by handicapped persons.

(2) The term "academic facilities" shall not include (A) any facility intended primarily for events for which

admission is to be charged to the general public, or (B) any gymnasium or other facility specially designed for athletic or recreational activities, other than for an academic course in physical education or where the Commissioner finds that the physical integration of such facilities with other academic facilities included under this chapter is required to carry out the objectives of this chapter, or (C) any facility used or to be used for sectarian instruction or as a place for religious worship, or (D) any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity, or (E) any facility used or to be used by a school of medicine, school of dentistry, school of osteopathy, school of pharmacy, school of optometry, school of podiatry or school of public health, as these terms are defined in section 298b of Title 42. For the purposes of this subparagraph the term "school or department of divinity" means an institution, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects.

(f) The term "institution of higher education" means an educational institution in any State which—

(1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized within such State to provide a program of education beyond high school;

(3) provides an educational program for which it awards a bachelor's degree, or provides not less than a

two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited:

(k) The term "nonprofit educational institution" means an educational institution owned and operated by one or more corporations or associations no part of the net earnings of which inures, or may lawfully inure to the benefit of any private shareholder or individual. [20 U.S.C. § 751(a)(1), (a)(2), (b), (k)].

Sec. 754. Period of Federal interest in project; recovery of payments.

(a) The Congress hereby finds and declares that, if a facility constructed with the aid of a grant or grants under subchapter I of II of this chapter is used as an academic facility for twenty years following completion of such construction, the public benefit accruing to the United States from such use will equal or exceed in value the amount of such grant or grants. The period of twenty years after completion of such

construction shall therefore be deemed to be the period of Federal interest of such facility for the purposes of this chapter.

(b) If, within twenty years after completion of construction of an academic facility which has been constructed in part with a grant or grants under subchapter I or II of this chapter—

(1) the applicant (or its successor in title or possession) ceases or fails to be a public or nonprofit institution, or

(2) the facility ceases to be used as an academic facility, or the facility is used as a facility excluded from the term "academic facility" by section 751(a)(2) of this title,

the United States shall be entitled to recover from such applicant (or successor) an amount which bears to the then value of the facility (or so much thereof as constituted an approved project or projects) the same ratio as the amount of such Federal grant or grants bore to the development cost of the facility financed with the aid of such grant or grants. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which such facility is situated. [20 U.S.C. § 754].

Sec. 757. Federal control over educational institutions prohibited.

No department, agency, officer, or employee of the United States shall under authority of this chapter, exercise any direction, supervision, or control over, or impose any requirements or conditions with respect to the personnel, curriculum, methods of instruction, or administration of any educational institution. [20 U.S.C. § 757].

STATEMENT OF CASE

Appellants, fifteen residents and citizens of the United States and of the State of Connecticut, and taxpayers of the United States, brought this action to enjoin the United States Secretary of Health, Education and Welfare and the United States Commissioner of Education from using Federal funds to finance the construction of facilities at defendant church related educational institutions pursuant to Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964), and for judgment declaring that such use was not authorized by the statute or, in the alternative, if authorized, was unconstitutional under the First Amendment of the United States Constitution. Joined as defendants were the chairman of the Commission on Aid to Higher Education of the State of Connecticut and four colleges in Connecticut whose applications for funds under the Act have been approved by him as well as the other defendants, as required by the Act.

A trial extending through five days was had before a special statutory district court of three judges, and the issues were orally argued and fully briefed by counsel for the respective parties.

The District Court held that the Higher Education Facilities Act authorized the grants of federal funds to defendant church related colleges and universities for construction of academic facilities and that government officials, both state and federal, had clearly acted within the scope of their authority in recommending and approving the challenged grants. It further held that the Higher Education Facilities Act and the grants were not violative of the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

The District Court, after carefully studying the provisions of the Higher Education Facilities Act of 1963, (the Act) and its legislative history, correctly concluded that church related colleges and universities were, in fact, encompassed within its terms.

In holding that the Act and grants were not violative of the Establishment Clause of the First Amendment, the District Court applied the *Schempp* test to the educational function of the church related colleges and universities and properly concluded that the Act passed muster as having a secular purpose of increasing the student enrollment capacity of the nation's institutions of higher education and a primary effect of aiding education without advancing or inhibiting religion.

The Act, as construed by the District Court, does not violate the Free Exercise Clause of the First Amendment because it does not coerce the appellants in the practice of their religion but is, in fact, religiously neutral.

ARGUMENT

I. THE HIGHER EDUCATION FACILITIES ACT OF 1963 AUTHORIZES THE CHALLENGED GRANTS.

In 1963, the Congress, fully cognizant of the urgent public need for additional higher education facilities to accommodate the rapidly increasing number of young people seeking higher education, adopted the Higher Educational Facilities Act, which was intended to encourage the expansion of facilities at colleges and universities throughout the country by providing financial assistance for that purpose. The federal grant provides only a part of the moneys needed to construct a particular facility at an eligible college; the bulk of the necessary moneys being supplied by the college itself. (Plain-

tiffs Exhibit 125, Par. 13(7); R. App., p. 78). No prohibition was incorporated in the Act limiting such assistance to publicly supported colleges. To the contrary, Congress specifically included non-profit colleges and universities in the largess of the Act (§ 751f, supra) undoubtedly recognizing the enormous contribution made by such private institutions in providing educational opportunities for young people at the college level and also recognizing that, "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence and experience". (*Board of Education of Central School District No. 1* v. *Allen*, 312 U.S. 236, 247).

Nor can it be successfully argued Congress was unmindful that the provisions of the Act would benefit church related colleges and universities which comprise a large percentage of the institutions of higher education in the United States. The legislative record evidences the fact that several amendments to deny the benefits of the Act to such institutions were defeated.[1] Additionally, the legislative history is replete with debates between proponents and opponents of the Act which overwhelmingly support the conclusion that the ultimate Congressional intent was to grant the benefits of the Act to qualifying church related colleges and universities.[2]

Undoubtedly, the desire of members of Congress to insure that the Act could not be construed as an attempt to advance religion culminated in the inclusion of § 751(a) (2) which specifically provides that the term "academic facilities" shall not include "(C) any facility used or to be used for sectarian instruction or as a place of religious worship" or "(D) any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity, . . ."

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[1]109 Cong. Rec. 19492-96 (1963).
[2]See generally 1963 U.S. Code Cong. and Adm. News, pp. 1172-1202.

The instant grants to defendant colleges and universities which have been challenged by the appellants are as follows:

1. Sacred Heart University submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new library.

2. Annhurst College submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new music, drama and arts building with an auditorium to be used for general academic programs.

3. Fairfield University submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new library building.

4. Fairfield University also submitted an application to the Connecticut Commission for and received a Title I grant for construction of a new science building to house the biology, chemistry, mathematics and physics departments, the computer instructional and research division and some biology-related functions of the psychology department; the grant requested was for construction of the science building minus the computer facilities.

5. Albertus Magnus College submitted an application to the Connecticut Commission for and received a Title I grant for construction of academic facilities to be located in a general academic building containing classrooms, faculty and administrative offices, faculty seminar room, student study area, language laboratories and adjoining offices and necessary related service and maintenance facilities; the grant was requested for construction of two language laboratories and adjoining

offices and necessary related service facility in the general academic building. (R. App., pp. 61, 62).

We submit that the above-quoted language and the record fully support the lower court's conclusion that the challenged grants were to be used for secular functions of the respective defendant colleges and universities and were authorized under the Act.

The appellants in their brief (pp. 12-14) readily admit that after thoroughly scrutinizing the language of the Act they can point to no specific provision to support their position that the benefits of the Act were intended to be withheld from church related colleges and universities. Absent an affirmative argument, the appellants necessarily fall back on the negative approach basing their argument on the fact that, despite extensive debate in the Congress, church related colleges and universities were not specifically included in the provisions of the Act. However, their argument has no efficacy in the light of the fact that specific amendments to exclude church related educational institutions from the benefits of the Act were proposed to the Congress and voted down. (Footnote 1, supra).

II. GOVERNMENT AID TO EDUCATION.

A. Historical Posture of Connecticut

Connecticut is known as the "Constitution State" because it was the birthplace of the world's first written constitution — The Fundamental Orders of Connecticut were adopted in 1639.

Accordingly, with the numerous legal attacks on the slightest interest of the government in the religious beliefs of its citizens pending in our courts, it would seem an appropriate moment for every citizen to review the beginning of

this great country commencing with the departure of the Pilgrims from England to avoid religious oppression by the King of England and their seeking of a land where each person would be free to practice his religious beliefs without fear of government interference.

It would be well to note that the flight of the Pilgrims was from religious oppression, not from God. Those who advocate nothing less than absolute separation of church and state might do well to ponder the fact that this nation was founded by a religious people who believed in God and were dedicated to such belief.

The First Amendment to the Federal Constitution prohibits governmental establishment of religion as well as governmental interference with the free exercise of religion. This provision is applied to the states by virtue of the due process clause of the Fourteenth Amendment. *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948). The corresponding provisions of the Connecticut Constitution adopted in 1965 are found in Article First, Section 3 and Article Seventh. The Connecticut Supreme Court had occasion to consider both the State and Federal constitutional provisions in 1960 in deciding the case of *Snyder* v. *Newtown,* 147 Conn. 374, in which the statutory provision for bus transportation to parochial schools was upheld. The case was appealed to this Court which dismissed "for want of a substantial federal question" (365 U.S. 299). Prior to reaching its decision, the state court gave a brief resume of the history behind the constitutional provision which, because it cannot be further condensed or improved upon, I set out below (pp. 383 to 387):

> "A very brief resume of the history behind article seventh, § 1, of our constitution, which was adopted in 1818, is helpful to an understanding of the meaning and

intent of the language used. The preamble to the Fundamental Orders, Connecticut's, and the world's, first written constitution creating a government, states, after reciting the need for "an orderly and decent Government established according to God," that the founders, that is, the inhabitants of Windsor, Hartford and Wethersfield, do "associate and conjoin . . . to be as one Public State or Commonwealth; and do . . . enter into Combination and Confederation together, to maintain and preserve the liberty and purity of the Gospel of our Lord Jesus which we now profess, as also the discipline of the Churches, which according to the truth of the said Gospel is now practiced amongst us; as also in our civil affairs to be guided and governed according to such Laws . . . as shall be . . . decreed" in the manner provided in the subsequent orders. The founders were a homogeneous people belonging, for the most part, to what was to them the one and only church. Guardianship of that church was a basic policy with them, and they regarded the state as the secular arm of the church. See 1 Col. Rec. 2, 21, 524, 525; Cobb, The Rise of Religious Liberty in America, p. 242; Coons, The Achievement of Religious Liberty in Connecticut, p. 3 (Conn. Tercentenary Commn., Com. on Hist. Pub., Pamph. No. 60). While the church and state were bound closely together, the privilege of a freeman was never conditioned upon church membership. Cobb, op. cit., p. 245. Ecclesiastical societies, however, were organized by the general court, that is, the legislative body; churches were erected at public expense; the minister was called by a town meeting; and the regular support of the church was raised by a tax on all. Id., 246; Greene, The Development of Religious Liberty in Connecticut, p. 58.

In 1669, the general court gave to dissenters from the approved Congregational churches "allowance of

their perswasion and profession in church wayes or assemblies without disturbance"; 2 Col. Rec. 109; but they were still taxed to support the approved churches. Coons, op. cit., p. 11; Cobb, op. cit., pp. 255, 264. Connecticut witnessed no such persecutions as occurred in other colonies. As tolerance gradually increased, further concessions were made to dissenters; these had the effect of enabling dissenters to pay for the support of the churches of their choice rather than the approved churches. Acts & Laws, 1769, pp. 169-171 (acts of May 11, 1727; May 8, 1729; Oct. 9, 1729); Statutes, 1784, pp. 21, 22; Cobb, op. cit., p. 501; Coons, op. cit., p. 22. Down to the time of the adoption of article seventh of the constitution of 1818, however, there was still a very large measure of authority in the general court over church affairs, with power to compel support of the church and attendance at services. The purpose of article seventh, and it finds its counterpart in the federal constitution and other state constitutions, was, in the words of Jefferson, to erect "a wall of separation between Church and State." 16 Writings of Thomas Jefferson 282; see Everson v. Board of Education, 330 U.S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711; Reynolds v. United States, 98 U.S. 145, 164, 25 L. Ed. 244; Jewett v. Thames Bank, 16 Conn. 511, 516; Second Ecclesiastical Society v. First Ecclesiastical Society, 23 Conn. 255, 274; Cobb, op. cit., pp. 248, 270, 501, 512, 513.

Let us turn now to the history of tax exemption in this state, because it throws light upon the meaning and intent of article seventh. Lands granted for the ministry of the gospel were exempted as early as 1684. 3 Col. Rec. 158; Statutes, 1702, p. 64. The exemption of church property continued during the following century and was in effect when the constitution was adopted by a convention in September, 1818, and ratified by the

people in October, 1818. Statutes, 1784, p. 111; id., 1796, p. 252; id., 1808, p. 433. At the session of the General Assembly the following May, another law was passed exempting church property from taxation. Public Acts 1819, c.2, § 14. The Revision of 1821 listed property which was subject to taxation; it did not specifically list church property nor specifically exempt it. Statutes, 1821, p. 444. It did, however, exempt ministers of the gospel from the poll tax, and their houses, lands or other taxable property to the amount of $2500 from the property tax. Statutes, 1821, pp. 448, 449. In 1822, the General Assembly repaired the omission in the Revision of 1821 and specifically exempted buildings occupied as "colleges, academies, school houses, churches or infirmaries." Public Acts 1822, c.29. This provision appears in the compilation of 1835. Statutes, 1835, p. 528; see Masonic Building Assn. v. Stamford, 119 Conn. 53, 57, 174 A. 301; Yale University v. New Haven, 71 Conn. 316, 333, 42 A. 87. Exemption of church property has been continued by the legislature in every compilation or revision of the general statutes since then to the present time. Statutes, 1838, p. 602; id., 1849, p. 603, § 11; id., 1854, p. 838, § 6; Rev. 1866, p. 707, § 6; Rev. 1875, p. 154, § 12; Rev. 1888, § 3820; Rev. 1902, § 2315; Rev. 1918, § 1160; Rev. 1930, § 1163; Rev. 1949, § 1761; Rev. 1958, § 12-81. A practical construction placed upon a constitutional provision immediately after its adoption and consistently and repeatedly followed by the legislature for over a century thereafter is most persuasive. Cahill v. Leopold, 141 Conn. 1, 14, 103 A. 2d 818; Water Commissioners v. Curtis, 87 Conn. 506, 511, 89 A. 189. The continued legislative exemption of church property from taxation is strong evidence of the meaning of the constitutional prohibition against compulsory support of a church.

Exemption from taxation is the equivalent of an

appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others. Lyman v. Adorno, 133 Conn. 511, 516, 52 A. 2d 702. The owners of tax-exempt property in the community derive the same benefits from government as other property owners but pay no property taxes for those benefits. This is true whether the relief from taxation be considered an exemption, as the legislature has described it, or results from a policy of considering church property not ratable for tax purposes. We conclude that the word "support" in article seventh was never intended to be employed in so narrow a sense as to prevent every sort of incidental public assistance to, and encouragement of, religious activity."

The decision in the *Snyder* case validating state aid for transportation of parochial school students was an enlargement of the judicial attitude that assistance to private agencies for public purposes was not proscribed by constitutional provisions. In the prior case of *Legat* v. *Adorno*, 138 Conn. 134 (1951), the Court had sustained the constitutionality of an appropriation to a non-profit private hospital for capital improvements on the ground that the hospital performed a public purpose in caring and treating persons suffering from chronic or other diseases, saying at page 148:

> " 'It is well settled that a private agency may be utilized as the pipe-line through which a public expenditure is made, *the test being not who receives the money, but the character of the use for which it is expended.*' " (emphasis supplied).

B. Historical Posture of The United States

The Federal Government has been assisting education in this country without distinguishing between secular and

sectarian institutions at least since 1820, and probably earlier. In that year Congress provided grants of federal funds to be used by various religious groups for the education of American Indians. References to said educational grants are found in the case of *Quick Bear v. Leupp*, 210 U.S. 50 (1908), wherein certain Sioux Indians challenged the constitutionality of a contract between the Commissioner of Indian Affairs and the Bureau of Catholic Missions of Washington for the care, education and maintenance of a number of Sioux Indian pupils at the St. Francis Mission Boarding School. Payments under the contract were to be made from the Sioux Treaty Fund which had been established by the government for the benefit of the Sioux tribe in return for the ceding of certain lands to said government. The claim was advanced that such payments violated certain provisos in the Indian Appropriation Acts forbidding the use of appropriated funds "for education in any sectarian school."

After holding that the provisos had no application to treaty funds, Chief Justice Fuller, in a unanimous decision, continued at p. 81:

> "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. Roberts v. Bradfield, 12 App. D.C. 475; Bradfield v. Roberts, 175 U.S. 291, 44 L. Ed. 168, 20 Sup. Ct. Rep. 121."

The *Bradfield* case cited in the *Quick Bear* case is an 1899 decision of this Court sustaining a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church.

Through the years the federal government has dispensed millions of dollars which could be said to have incidentally

or indirectly aided religion. For example, benefits of the National School Lunch Act are available to students in private schools (42 U.S.C.A. § 1751, et seq.). Also, private hospitals may apply for funds under the Hospital Survey and Construction Act of 1936 (42 U.S.C.A. 291, et seq.). Evidently Congress has not recognized a constitutional prohibition as long as a secular purpose is being aided or advanced.

III. THE ESTABLISHMENT CLAUSE.

The First Amendment clause prohibiting an establishment of religion was intended, according to Thomas Jefferson, writing in a letter to Danbury, Connecticut Baptists, to erect "a wall of separation between church and state". *16 Writings of Thomas Jefferson,* 281-282 (1903); *Reynolds* v. *United States,* 98 U.S. 145, 164 (1878). However, the First Amendment has been construed by this Court as safeguarding freedom of religion, rather than freedom from religion. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Zorach* v. *Clauson,* 343 U.S. 306 (1952).

This Court in *Everson* v. *Board of Education,* 330 U.S. 1, a five to four decision, upheld a New Jersey statute authorizing town boards of education to reimburse parents for money spent to transport their children on public school buses to public and parochial schools. The statute had been challenged by a taxpayer on the ground that, inter alia, it violated the establishment clause. Mr. Justice Black, on behalf of himself, Chief Justice Vinson and Justices Reed, Douglas and Murphy, rejected the establishment challenge, stating at page 17:

> "The language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their religion. It cannot exclude Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists,

non-believers, Presbyterians or the members of any other faith because of their faith from receiving the benefits of public welfare legislation. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state

to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

Zorach v. *Clauson,* 343 U.S. 306, involved the question of "released time" which permitted public schools to release students during the normal school day to go to private centers for religious instructions or devotional exercises. Only those students whose parents made written request were released, the others remained in the classroom. This Court decided that "released time" neither prohibited the free exercise of religion nor violated the establishment clause of the First Amendment to the Federal Constitution. Justice Douglas in the majority opinion made the following noteworthy comments regarding the relationship between church and state at page 312, et seq."

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly . . . . We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be

to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."

The test to be applied in establishment clause cases was first articulated by this Court in *Abington Township School District* v. *Schempp*, 374 U.S. 203 (1960), which considered the constitutionality of a statute of Pennsylvania requiring at least ten verses from the Holy Bible to be read, without comment, at the opening of each public school on each school day. Any child could be excused from the Bible reading upon written request of his parent or guardian. This Court affirmed a Circuit Court decision holding the state statute to be violative of the establishment clause. Mr. Justice Clark, speaking for the court, laid down the test at p. 222:

"As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: *What are the purpose and primary effect of the enactment?* If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that *to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*

Everson v. *Board of Education,* 330 U.S. 1." (emphasis supplied).

This Court affirmed the test in *Board of Education of Central District No.* 1 v. *Allen,* 392 U.S. 236, (1968), involving the constitutionality of a New York law which required local public school authorities to lend textbooks without charge to all students in grades seven to twelve in private as well as public schools. In a split decision (6 to 3), this Court recognized the secular educational function performed by private and parochial schools holding that the Textbook Loan Law benefited school children thereby serving a secular educational function rather than benefiting a religious denomination.

This Court "has long recogized that religious schools pursue two goals, religious instruction and secular education." (id. at 245). There is substantial case law supporting the power of states to establish standards which must be met by private schools. Indeed, the Court said at page 247, "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

Private education has played a significant role in raising national levels of knowledge, competence and experience. Private religious schools are performing a secular function as well as a sectarian function. Not all teaching in a sectarian school is religious. Nor is the process of secular and religious training so intertwined that secular textbooks furnished to students by the public will become instruments in the teaching of religion. (id. at pages 247, 248).

We submit that it was never the purpose of the Establishment Clause of the federal Constitution or the comparable articles of the Connecticut Constitution to prohibit coopera-

tion between the state and religious organizations when a valid secular purpose was fulfilled. Accordingly, the expenditure of public funds to transport children to parochial schools was held constitutional by the Connecticut Supreme Court in *Snyder*. This Court recognized such expenditures of public monies as being primarily in the interest of public health, safety and education in the *Everson case*. In like manner, the Connecticut Sunday closing law was upheld by the State Supreme Court as primarily decreeing a day of rest in the interests of the physical and moral welfare of the community rather than as religious legislation. *State* v. *Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958). To like effect the decision of this Court in *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

The permissible area of government involvement with religion has been rationalized by some commentators as justified not only as religious neutrality, but also as political neutrality. Basically, the concept of political neutrality allows State activity in connection with a religiously affiliated organization where the secular purpose of such organization warrants inclusion in the scheme of governmental operation.

> "The principle of political neutrality recognizes that religious associations operate in the temporal realm and accordingly can be legitimately included among the beneficiaries of the prevailing order established and sustained by the State." Giannella, *Religious Liberty, Non-Establishment and Doctrinal Development, Part II. The Non-Establishment Principle*. 81 Harvard L.R. 513, 519 (1968).

In this "neutral atmosphere", zoning regulations requiring parochial and other private schools to indicate their proposed land use and general building plans to a town planning and zoning commission have been held not to discriminate against religion. *St. John's Roman Catholic Church*

Corporation v. *Town of Darien, et al,* 149 Conn. 712, 184 A. 2d 42 (1962).

It should be noted that each of the facilities for which the defendant institutions received federal grants under the Act were dedicated to secular educational purposes and not to religious purposes. It should also be obvious that without the expansion of private college facilities the State of Connecticut would be unable to expand the facilities at public educational institutions to accommodate the flood of applicants seeking the benefit of higher education. Circumstances, therefore, dictate that government and private colleges cooperate to meet the educational crisis in higher education.

Applying the secular purpose and primary effect test which was first enunciated in *Schempp* and restated in *Allen,* we submit that the Act and grants meet both requirements. The declaration of congressional policy and purpose is expressed in the preamble of the Act as follows:

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities." (§ 701).

The lower Court properly found that the findings and policy statement of Congress were unassailable and therefore correctly concluded that the Act had a "secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education — an existing urgent public need — and that the Act does not have the purpose of promoting religion of any kind." (R. App., p. 49).

In addressing itself to the second requirement of the test that the Act have a primary effect which neither advances nor inhibits religion, the lower court found that the focus of the test as applied in *Allen* "is the function, secular or religious, which the government aid subsidizes — not the nature of the institution, secular or religious, which receives the aid." (R. App., p. 49).

The lower court went on to quote the summarization by this Court in the *Allen* case of the relationship of the sectarian function to the secular function of private schools, including parochial schools:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial

schools are performing, in addition to their sectarian function, the task of secular education." (R. App., p.50).

The duality of functions of church related institutions must have been in the forefront of collective Congressional thought when it defined the term "institution of higher education" without regard to church relationship (§ 751(f)) and excluded from the definition of "academic facilities" entitled to be qualified for grants those facilities which were used or to be used for religious worship or instruction. (§ 751(a)(2)(C) and (D), supra). These provisions of the Act make it abundantly clear that it is the *use of the facility* to be constructed rather than the *nature of the institution* at which the facility will be constructed which is determinative of grant qualification under the Act.

This Court has long recognized the selfish interest of government in the education of its citizenry, This interest transcends the individual interests of its citizens and the collective interests of any organization, secular or religious. *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 375 (1930).

We submit the reasoning of the lower court is sound and finds strong support in the equally sound judgment of this Court in the *Bradfield* case, supra, sustaining a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church and is in accord with the decision of the Connecticut Supreme Court in *Legat* v. *Adorno*, supra, which found the test to be not who receives the money, but the character of the use for which it is expended.

Such unanimity of judicial thought and opinion should not be disturbed.

IV. RECENT COURT DECISIONS.

A. Walz v. Tax Commission of City of New York

The decision of the lower court in the instant case was rendered before the judges could avail themselves of this Court's reasoning in *Walz* v. *Tax Commission of the City of New York*, 90 S. Ct. 1409 (1970), which upheld the constitutionality of governmental property tax exemptions to religious organizations for religious properties used solely for religious worship.

However, the application of the rationale of this Court in the *Walz* case does not overrule or render ineffective the decision of the lower court in the instant case; to the contrary, it supports and strengthens that decision.

The appellants' emphasis on the so-called *Everson* test of no-aid to religion loses any efficacy it might formerly have had in view of the restatement by this Court of the legislative purpose and primary effect test in citing with approval the *Allen* case. Id., at 1413. As the appellants suggest, quoting a case with approval is hardly an effective way to repudiate it.

The *Walz* decision also effectively eliminates the child-benefit theory from consideration since this Court recognized that making textbooks available to pupils in parochial schools in common with public schools in the *Allen* case constituted permissible "*'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books.*" (Emphasis supplied) (Id., at 1413).

In our view this Court has given the *Schempp* test a new dimension in *Walz by* proscribing "excessive entanglement" of government in religion which might lead to the advancement or inhibition of religion.

In the instant case there is not even a semblance of the proscribed involvement, since § 757 of the Act, supra, specifically prohibits federal control over any educational institution which receives a grant thereunder.

In an attempt to convince the Court that the Act will lead to "excessive entanglement" of the Government with religion, the appellants cite § 754(b) of the Act, supra, which provides that if at any time within twenty years after construction of the facility it is used for religious worship or instruction the institution must make pro-rata restitution to the Government. However, no evidence was introduced by the appellants which would indicate that the Government intended to subject the colleges and universities to continuous and sustained surveillance for twenty years. As Mr. Chief Justice Berger noted in *Walz*, Id., at p. 1416, "there is no lack of vigilance on this score by those who fear religious entanglement in government" and, it is submitted, the Government will presume that the challenged facilities are being used for the secular purposes for which they were constructed until such time as a report is received to the contrary from a vigilant citizen.

B. Lemon v. Kurtzman

This case involved the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1970 which authorized payment of state funds to nonpublic elementary and secondary schools as reimbursement for teaching certain secular subjects. A special three-judge district court rendered a 2-1 decision on November 28, 1969 holding the Act did not violate the establishment clause. In arriving at its decision, the Court applied the rationale of the *Allen* case.

This case was also decided before the *Walz* decision, is on appeal to this Court (No. 1189, O. T. 1969) and is scheduled for argument immediately prior to the instant case.

Since the issues in the *Lemon* case will be thoroughly briefed by counsel for the respective parties, we will not burden this Court with a detailed analysis of the decision. Suffice it to say that we concur with the rationale of the decision and respectfully commend it to this Court.

C. Dicenso v. Robinson

This case involved the constitutionality of the Rhode Island Salary Supplement Act which provided salary supplements to teachers in nonpublic schools.

The special three-judge district court held the Act to be violative of the establishment clause in a decision rendered June 25, 1970. The court rejected the *Schempp-Allen* test declaring it to be confusing and thus useless. The decision is contra to the rationale of the respective district courts in *Lemon* and the instant case.

Since the case has been appealed to this Court (No. 569-570, O. T. 1970), the issues in the case will be thoroughly briefed for the Court's benefit by counsel for the respective parties so that we will refrain from further burdening the Court with a detailed analysis in this brief.

D. State Court Cases

In *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A. 2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966), the Maryland Court of Appeals held that the constitutionality of direct construction grants under the establishment clause was dependent on whether the recipient institution was "sectarian". The court set up numerous factors which were to be considered in arriving at such a conclusion.

We subscribe to the statement of the district court in the instant case that the rationale of that court is not consistent

with the *Allen* secular purpose and primary effect test and should not be considered by this Court.

The most recent state court decision holding a state statute granting aid to parochial and private schools to be constitutional is Michigan case No. 52933, *In the Matter of the Legislature's Request for an Opinion on the Constitutionality of Chapter 2 of Amendatory Act No. 100 of the Public Acts of* 1970. (*Enrolled Senate Bill No.* 1082) decided September 14, 1970. In a 4-3 decision the Michigan Supreme Court held that the Act was *not violative* of the U.S. Constitution.

It is anticipated that the opinion of the Michigan Court will be available for the use of this Court before oral argument and copies will be supplied to the clerk.

V. THE FREE EXERCISE CLAUSE.

The appellants also claim that the use of Federal funds to finance church related educational institutions constitutes compulsory taxation for religion and therefore impairs their free exercise of religion.

Since the appellants use only three short paragraphs in arguing their free exercise claim, we submit they are less than confident that their argument will prove convincing to this Court.

The short answer to their claim is that the lower court properly dismissed the free exercise claim as being without merit since they had not shown that the Act coerces them as individuals in the practice of their religion. Such coercion is a prerequisite to a finding that a legislative enactment abridges the free exercise clause. *Allen*, supra, pp. 248-249.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the Higher Education Facilities Act of 1963 and grants thereunder are not violative of the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States and, therfore, the decision of the lower court should be affirmed.

Respectfully submitted,

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